



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ENVIRONMENTAL & LAND CASE 729 OF 2011

JACOB JUMA1ST PLAINTIFF
PARK HEALTH CENTRE LIMITED 2ND PLAINTIFF
NECTEK (K) LIMITED 3RD PLAINTIFF

VERSUS

JANE WANJA NJIRU 1ST DEFENDANT
WANJIKU ITHONDEKA2ND DEFENDANT

RULING

1. The Plaintiffs/applicants hereinafter referred as the applicants have filed a Notice of Motion dated 19th December 2011 under section 1, 1A, 1B, 3, 3A, 63 (c) & (e) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Order 40, rules 1,2,4,8 & 9 and Orders 51, rule 1 of the Civil Procedure Rules of 2010.

i. The defendant by her herself or by her agents, servants or otherwise however be restrained from advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with property L.R. No. 209/7842, Nairobi pending the hearing and determination of this suit.

ii. The defendant by herself or by her agents, servants or otherwise howsoever be directed by an order of mandatory injunction to deliver vacant possession of property L.R. No. 209/7842, Nairobi to the plaintiff pending the hearing and determination of this suit

iii. The cost of this application be provided for.

The application is based on the following grounds;-

i. The plaintiff was until the 27th day of June, 2011 the registered owner of property L. R. No. 209/7842, Nairobi and until the 16th day of December, 2011 the occupier of the same property.

ii. The defendant has fraudulently transferred the property to herself.

iii. On the 16th day of December, 2011 when the plaintiff was the lawful occupier of the property, defendant wrongly broke and entered the plaintiff's house constructed on the property, seized and took possession of the plaintiff's furniture, goods, chattels and wrongfully removed and threw the same out of the house in purported distress for rent and enforcement of an eviction order issued in C.M.C.C. No. 5718 of 2011, Jane Wanja Njiru Vs. Jacob Juma.

iv. At the time of the defendant's entry into the plaintiff's house and seizure of the plaintiff's furniture, goods and chattels, the plaintiff was not a tenant of the defendant who claims to have obtained title of the property and there was in fact, no rent due and owing from the plaintiff to the defendant.

v. In the circumstance the defendant was not a person having any rent or rent service in arrear and due upon a grant, lease, demise or contract and therefore, entitled to the remedy by distress for the recovery of that rent or rent service on the property as against the plaintiff or at all.

vi. In any event, the defendant was not entitled to any rent or rent service or mesne profits from the plaintiff as the plaintiff was in lawful occupation and possession of the property as the owner thereof. The defendant could not therefore, seek to dispossess the plaintiff of the property through an illegal distress for rent or eviction order.

vii. The defendant's action was undertaken in an illegal attempt to steal a march on the plaintiff, hurriedly, intentionally, blatantly and unlawfully thereby totally disturbing the status quo ante

viii. The defendant ought not to be allowed to retain the position of advantage obtained through her planned and unlawful act.

ix. This is a clear and special case in which a restraining and mandatory injunction ought to issue to remedy the defendant's wrong.

x. The defendant will until restrained by an order of this Honourable Court continue with her fraudulent action, resist the surrender of vacant possession of the property to the plaintiff, alienate and/or encumber the property as a result of which the plaintiff will suffer irreparable injury.

xi. The plaintiff is ready, able and willing to furnish a suitable undertaking as to damages, if any, which may be suffered by the defendant as a condition for the grant of the orders sought herein.

2. The 1st plaintiff filed a supporting affidavit dated 19/12/2011 and a supplementary one dated 9/1/12. He also filed a supplementary affidavit sworn by Monica Mbugua dated 9/1/2012. The plaintiff/applicant avers that he is the proprietor of L. R No. 209/7842 Nairobi. That he bought the said property in 1997 and it was transferred to him in 2007. He took possession of the property and has resided in the property until 16/12/2011 when the defendant evicted him. Apart from owning the said property he is also a director of Park Health Centre Ltd. The said company is the registered owner of L. R. No. 209/13442 Nairobi.

3. That on 11/5/10 the defendant and him entered into a loan agreement, the loan was to be paid by the end of August 2010. Security for the said Loan was the title of property L. R. No 209/78442 the suit premises. On the 27/7/10 the defendant and Park Health Centre Ltd and Nectek (K) Ltd of which he is a majority shareholder and principal officer entered into an agreement. The terms were as follows.

a) Nectel (K) Limited would sell its 250 shares in Park Health Centre Limited to the Defendant for kshs.40,000,000.00.

b) One acre of property L.R. No. 209/13442. Nairobi would be transferred to the defendant.

c) A sum of Kshs.5,000,000.00 was paid to the vendor.

d) The balance of Kshs.35,000,00.00 would be paid within 5 months of the date of agreement.

e) The completion documents set out in the agreement for sale would be released to the defendant upon the defendant's payment of the balance of the purchase price.

4. That he caused Park Health Centre Ltd to perform its part of the agreement for sale and transferred 250 shares to the 1st defendant. That on the 27/7/2010 and 25/8/10 the defendant and him varied the loan agreement of 11th May 2010 to incorporate the sale agreement of 27/7/2010 upon terms and condition *inter alia* that:-

a) The loan and interest of Kshs.2,230,000.00 under the loan agreement of 11th May, 2010 be appropriated towards the deposit of the purchase price under the agreement for sale which, together with a further sum of Kshs. 1,250,000.00 paid by the defendant to him would total to Kshs. 3,370,000.00 leaving a balance of kshs.36,360,000.00 payable under the agreement for sale.

b) Upon transfer of the 250 shares to the defendant, the defendant would release the title for property L.R. No. 209/7842, Nairobi to him

5. This variation was acknowledged in the letters dated 27/7/10 and 25/8/2010 drawn by their common advocate Ndonye & Associates. The defendant did not perform her obligations under the agreement for sale and failed to pay the balance of the purchase price. The defendant kept informing him between July 2010 and September 2011 that the Title for L. R. 209/7842 which she held for the loan agreement dated 11/5/10 was lost.

6. That subsequently on the 7/9/2011 the plaintiff was paid a visit by an auctioneer Stephen Nyamu Mbijiwe to levy distress for rent allegedly on behalf of the defendant. The Auctioneers gave him a letter of instructions dated 5th August 2001 from Muthaura Kiome & Mwarania Advocates, a transfer of the property from him to the defendant together with a copy of the title that indicated a transfer of the same to the defendant on the 27/6/2011 for a consideration of ksh.5,000,000/-.

7. That this transfer is fraudulent as the transfer of the property was not proceeded with an agreement for sale, the defendant did not pay him Kshs. 5million, that the loan of 11/5/2010 had been fully satisfied by the terms of agreement of 27/7/2010 and 25/8/2010, that the transfer of the property was not executed by him as he was away in Zimbabwe on the 16/12/10 and he still was in possession of the property until the 16/12/11. That there is no tenant landlord relationship between them and that having bought the property in 1997 for 5million, he could not sell and transfer it for the same amount in 2010. That the property was valued at 40Million and could not be valued at 100million. That the defendant is still indebted to 1st plaintiff in the sum of 3663000/-.

8. That because of the defendant's breach of the agreement for sale he will suffer loss and damages as follows;

a) He no longer has possession of property L. R. No. 209/7842, Nairobi.

b) He incurred costs of movement from property L. R. No. 209/7842, Nairobi estimated at kshs.1,000,000.00.

c) He has lost and will loose rent at Kshs. 250,000.00 per month which he has to pay for the house he has moved into from the 16th day of December, 2011 until surrender of vacant possession of the property to him.

9. The defendant has been enriched by receipt of the 250 shares in Park health Centre Limited together with one acre of the property L. R. No. 209/13442, Nairobi at his expense and it would be unjust an inequitable to allow the Defendant to retain the benefit thereof and at the same time refuse and/or fail to release the title to property L. R. No. 209/7842, Nairobi to him.

10. That on the 16/12/11 the defendants agents Siuma Traders Auctioneers levied distress and his

household goods and also enforced an eviction order. That at that time he was not a tenant of the defendant, no rent was due and owing to the defendant or is the defendant entitled to any mesne profit as he is lawfully in occupation; that he regained entry into the premise after the Court orders in C.m.c.A 5718 of 2011 which had been filed by the defendant were discharged.

11. That he has been advised by his counsel which advice he believe to be correct, that the loan agreement of 14th May, 2010 was in the nature of a mortgage by conditional sale, requiring the 1st defendant to comply with the provisions of the Transfer of Property Act as regards execution, attestation, service of notice before transfer and the Mortgages (special Provisions) act in order to take possession, all of which were not complied with. That the transfer was not executed by him and witnessed by 2nd defendant as he was away in Harare Zimbabwe on the dated 16/12/10. That unless restrained the defendant will continue with her breach of the agreement for sale and fraudulent actions.

12. The defendant filed grounds of opposition and a replying affidavit sworn by Jane Wanja Njiru the defendant. The grounds of opposition are as follows:-

i. That the applicant has not met the condition for an injunction as required in the case of Geilla Vs. cassman Brown Co. Ltd 1973 EA 358.

ii. That the application and the suit is a an abuse of the process of the Court, the plaintiff having offered his property as security for a loan but having been unable to repay the said loan.

iii. That the applicant is guilty of material non- disclosure and or has suppressed material facts hence he is not entitled to the exercise of the discretion of the Court in his favour.

iv. That the applicant has fraudulently purported to manufacture documents, namely the purported acknowledgement letters' in order to mislead the Court and the plaintiff doe s not therefore deserve an equitable remedy as he had tainted his hands.

v. That the applicant's conduct in regaining entry into and repossession of, the sit premises, using thugs and a gun against the defendant's agents, makes him unworthy of the injunction sought and the reliefs he has asked the Court, which he is not entitled to.

vi. That the applicant ought to have deposited with the Court, and should deposit now, the loan advance the basis of the defendant's eviction order together with interest accrued thereon to date as a condition for a grant of any injunction.

vii. That having been unable to repay the loan and interest hereon and the defendant having transferred the security to her name, the plaintiff is non-suited, being merely a trespasser on the defendant's property who cannot enjoy injunctive orders against an owner of property.

viii. That the purported acknowledgement letters which purport to alter the terms of the agreement for the sale of shares are not executed either by the defendant or by the companies concerned and the defendant has never been aware of them.

ix. That the purported acknowledgement letters are not under seal of the companies concerned and the same are merely an agreement between the plaintiff and himself and the same have no effect on the agreement made on 27th July 2010 between PARK HEALTH CENTER, NECTEL (K) LIMITED AND JANE WANJA NJIRU.

x. That the purported acknowledgement letters are of no effect over the agreement dated 27th July 2010 as the defendant dully performed her part of the contract as evidenced by the transfer of shares to the defendant but the said companies have not transferred to the defendant an acre out of L.R. No. 209/13442.

xi. That the plaintiff and the defendant have neither the locus standi nor privity of contract to drag matters involving a limited liability company into a contract they entered as natural persons.

xii. That the agreement of 27th July related to shares and an acre by a company that has no assets or value and the land in question does not belong to the plaintiff being government land as per government report (Ndungu Report) and the agreement is itself a fraud. The agreement was never part of the settlement of the loan.

xiii. That the plaintiff ought to pay the amount now outstanding being Kshs. 55,535,990 as at 30/d12/2011 or a reasonable sum thereof into court.

13. The defendants avers as follows; that they had a loan agreement dated 14/5/2010, that it is true that she had an agreement with the two companies Park Health Centre Ltd and Nectek (k) Ltd of which the plaintiff is a shareholder, that 250 shares were transferred to her after she paid the balance of the purchase price, that she is not aware of the two letters delivered by the plaintiff dated 27/7/10 and 25/8/2010 which he states varied the terms of the agreement of 14/5/10. She was not a party to any of them nor did she sign them;

14. That the 1st plaintiff was to pay the sum loaned in the agreement dated 14/5/10 with 90 days. The agreement had specific terms, that after the plaintiff failed to repay the loan, she transferred the property to herself. The 1st plaintiff at the time of the agreement had surrendered the title of the suit premises L. R. No. 209/7842 to her together with a duly signed but undated transfer form, pin certificate, national ID card and passport size photographs which she used to transfer them properly;

15. That the advocate wrote to the 1st plaintiff about the default and asked him to make good the payment before she could transfer the property to her name, that after the transfer she decided that the defendant vacates the property but he kept asking for more time and later he offered to pay the rent of 200,000/- per month. The 1st plaintiff did not pay rent and she sent auctioneers to his house.

16. That the loan agreement was sufficient precedent for a sale agreement. That there was no need for payment to the 1st plaintiff further to the sums advanced to him and that as at the date of transfer the same loan exceeded to Kshs.5million and the government had valued the property at 10Million. That there was no agreement entered by her on the 27/5/2010 and 25/8/10. That the plaintiff was aware of the transfer and she made a demand for possession severally before instituting the suit for eviction

17. That the 1st plaintiff's complaint to the police has been dismissed as a hoax and further he purported caveat has not been acted upon by the lands department, that the 1st plaintiff has failed to establish on areas and the claim against her, that the 1st plaintiff has regained entry into the property by unlawful means and not entitled to the order of injunction.

18. Apart from the 1st plaintiff affidavits and 1st defendant there is a supplementary affidavit sworn by Monica Mbugua an advocate of the high also avers that she acted as the common advocate for the parties in the agreements for sale dated 27/7/2010. That she witnessed the execution of the said agreement by the plaintiff and 1st defendant. That the deposit on the purchase price under the agreement for sale dated 27th July, 2010 in the sum of kshs.5,000,000.00 was not paid by the 1st defendant on execution of the agreement for sale on 27th July 2010; that at the time of drawing up the agreement the parties disclosed to her the loan that the 1st defendant had advanced to 1st plaintiff of Kshs.2.1Million which they instructed her will be utilized towards the deposit on the purchase price under the agreement for sale dated 27th July 2010. At paragraphs 7, 10 and 11 she depones the instructions of the 1st plaintiff gave her over the agreement of 27th July 2010. She further depones that she draw up and witnessed the execution of the transfer form of 250 shares to the 1st defendant and the same way duly effected in the register of the 2nd plaintiff at the Companies Registry and avers that she has never received any monies from the 1st

defendant for onward transmission to the 1st plaintiff

19. I note that on the 11/1/12 the plaintiff filed an amended plaint. The amended plaint brought two other plaintiffs namely Park Health Centre Ltd as the 2nd plaintiff and Nectek (K) Ltd as the 3rd plaintiff. It also added Wanjiku Ithondeka as the 2nd defendant. There was no amended Notice of Motion after the amended plaint was filed.

20. Counsels for the parties made oral submission during the inter partes hearing. Issues were raised for consideration. Mr. Havi submitted that there was no sale agreement between the 1st plaintiff and 1st defendant, the loan agreement dated 14/5/2010 between the two was varied by the agreement of 27th July 2010 and that this is confirmed by Monica Mbugua in her affidavit and therefore the 1st defendant had no right to transfer the property as liability had been paid. That the 1st plaintiff did not execute the transfer document as he was out of the country nor did the 1st plaintiff appear before Wanjiku Ithondeka and this issue remains unchallenged by the plaintiff. That if the injunction is granted it will preserve the status quo as the 1st plaintiff regained entry into the suit property after the lower Court order was discharged, if the orders are granted the 1st defendant can be compensated by an award of costs, but if the injunction is not granted the property will be alienated and the 1st plaintiff will be without a remedy should he succeed.

21. Mr. Muriith for the respondent argued that there was a sale agreement dated 14th of May 2010 and the terms were clear at paragraph 4 and 5. That the terms of sale were accommodated in the agreement which have also been referred to in the amended plaint. That things changed when the 1st defendant realized the 1st plaintiff was selling public land that the annexures to Ms Mbugua's affidavits were done between the 1st plaintiff and the advocate, the 1st defendant was not present. On the transfer of document counsel submitted that the 1st defendant explains the circumstance under which the execution was done, yet the plaintiff does not deny his photograph nor copy of the ID card attached. That clause 4b of the agreements stated that the 1st plaintiff was to deliver to the 1st defendant a duly executed transfer form in favour of lender of the suit property. That the 1st plaintiff is guilty of material non disclosure and is misleading the Court. That the registrar of Government Lands acted on the transfer and the title is in the 1st defendant's name and no grounds have been set before the court to fetter with that discretion. He urged the Court to peg the injunction on a condition if it is to be granted that the plaintiff pays rent pending the hearing of the suit.

22. In response to the 1st defendant's argument Mr. Havi argued that the copy of photograph and ID are not documents that can bind the 1st plaintiff to the transfer, that the transfer is for consideration of 5 million yet the total was 2.5 million, that the 1st defendant had no justification to take the law into her hands and on the indefeasibility of the title that can be set aside if the fraud is established. On the condition of granting an injunction there is no basis for it as the 1st defendant has attempted to levy the distress and the same order was discharged.

23. I have carefully considered filed together with annexures, the authorities cited of Anjanaben Anil Shah Vs. Kenya Akiba Limited (2005) eKLR and Estehr Njeri Njuguna vs. Kenya Akiba Micro Finance Ltd 7 2 others (2006) and the submissions made and I find as follows;- the main issue between the parties is whether there was a sale agreement between the 1st plaintiff and the 1st defendant. The 1st plaintiff argues that there was no such agreement and that the title the 1st defendant had was held as security and that he was not a party to the transfer document and that the agreement of 14/5/2010 was varied by the one of 27th July 2010. The 1st defendant cases that she had a right to transfer the document as the 1st plaintiff had signed the undated transfer document.

24. As I consider these facts I note that the ruling I am making is on an interlocutory stage. In considering the application I am guided by the principles in the case of Geilla Vs. Cassman Brown & Co. Ltd EA. 1973

- i. That an applicant has a prima facie case with a probability of success;
- ii. That an applicant will suffer irreparable injury if the injunction is not granted
- iii. If the Court is in doubt, it will decide the application on the balance of convenience.

25. There is a dispute as to whether there was a sale agreement that gave the 1st defendant the right to transfer the property. The applicant challenges the way the transfer was done. From the facts deposed it is hard to decide what happened between the parties. To reach a just conclusion it would be vital for the court of hear viva voce evidence. I note that after the plaint was amended the 2nd defendant was not served. It is alleged that the agreement dated 14th May 2010 which has triggered the dispute between the 1st plaintiff and 1st defendant was witnessed by the 2nd defendant in the amended defence. The plaintiff denies he appeared before the said counsel. Again for this to be established viva voce evidence needs to adduced to establish the truth.

26. The 1st plaintiff is in possession of the suit premises. The suit property is in the name of the 1st defendant claims she is suffering loss as the 1st plaintiff is not paying rent yet she owns the property. principles in the case of Geilla Vs. Cassman Brown & Co. Ltd EA. 1973

“If the Court is in doubt, it will decide the application on the balance of convenience”. The issues between the parties in this suit can only be determined at a full hearing. In order to preserve the status I make the following order.

- i. That the parties shall preserve the status as it is now. The 1st plaintiff is in possession.
- ii. None of the parties should carry out any adverse activities that would be prejudicial to the suit property.
- iii. The parties shall comply with the provisions of order 11 within 30 days from the date of this ruling and thereafter take a hearing date within 60 days from the date of compliance with order 11. Costs shall be in the cause. Orders accordingl

Dated and delivered this 20th Day of April 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicants

..... For the Respondents

..... Court Clerk